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# VINE OF THE DEAD: REVIVING EQUAL PROTECTION RITES FOR RELIGIOUS DRUG USE

David Garrett\*

## I. Introduction

In 2000, a small religious group from New Mexico filed a motion for preliminary injunction against the government, challenging a ban on the group's use of a hallucinogenic tea imported from Brazil.<sup>1</sup> The district court granted a preliminary injunction under the Religious Freedom Restoration Act (RFRA).<sup>2</sup> The Tenth Circuit affirmed.<sup>3</sup> In a unanimous opinion, the Supreme Court also affirmed, and found that the government failed to demonstrate a compelling interest in barring the group's religious use of the hallucinogen.<sup>4</sup> The religious group, however, also asserted an equal protection argument, claiming that the group should receive a federal exemption from the Controlled Substances Act<sup>5</sup> for the use and importation of their drug, similar to the peyote exemption for the Native American Church.<sup>6</sup> The district court wrongly rejected the equal protection claim.

Part II of this note will discuss the background of the parties involved with this issue, as well as the relevant legal authorities. Part III will summarize the case at hand on the district and appellate levels, as well as the memorandum opinion, which exclusively covers the equal protection issue. Part IV will analyze the equal protection issue and the Court's decision. Part V will conclude the note.

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1. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (*O Centro I*), 282 F. Supp. 2d 1236, 1238, 1240 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), *aff'd en banc*, 389 F.3d 973 (10th Cir. 2004), *aff'd*, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. Ct. 1211 (2006).

2. *Id.* at 1271; *see* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

3. *O Centro*, 389 F.3d at 976 (per curiam).

4. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. Ct. 1211, 1216 (2006).

5. 21 U.S.C. § 801 (2000).

6. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (*O Centro I*), 282 F. Supp. 2d 1236, 1244 n.3 (D.N.M. 2002).

## II. Background

### A. Uniao do Vegetal

Uniao do Vegetal (UDV) is a religious movement known for its reliance on hoasca,<sup>7</sup> an entheogenic herbal tea consumed primarily for spiritual enlightenment.<sup>8</sup> UDV may be best characterized as a Christian Spiritist sect with shamanistic roots.<sup>9</sup> Though the UDV church is relatively young,<sup>10</sup> shamanistic practices have existed for thousands of years.<sup>11</sup> Throughout time, shamans have been credited with powers to diagnose and cure human illness, interpret dreams, predict the future, and converse with spirits.<sup>12</sup> These powers are associated with the ability to achieve an out-of-body experience known as “trance,” where a shaman summons his soul to traverse a parallel spiritual dimension.<sup>13</sup> To accomplish the altered state of consciousness required for trance, shamans use a variety of methods such as chanting, dancing, drumming, and especially the use of entheogenic hallucinogens like hoasca, which are often derived from plants.<sup>14</sup> Thus, hoasca is essential to

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7. “Hoasca,” in the Quechua Indian language means “vine of the dead,” or “vine of the soul.” *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1174 (10th Cir. 2003). Hoasca is made by blending together two indigenous Brazilian plants, banisteriopsis caapi and psychotria viridis. *Id.* at 1175. Psychotria contains dimethyltryptamine (DMT), a federally prohibited substance. *Id.* Banisteriopsis contains harmala alkaloids, also known as beta-carbolines that allow DMT’s hallucinogenic effects to transpire by suppressing monoamine oxidase enzymes in the digestive system that would otherwise dissolve the DMT. *Id.* Thus, when the two plants are united within the digestive system, usually in the form of a tea-like substance, they allow DMT to influence the mind in quantities sufficient to substantially alter the present state of consciousness. *Id.*

8. Gabrielle Raemy Charest, *The Visionary Vine: When Domestic Religious Freedom and International Law Conflict*, 12 TUL. J. INT’L & COMP. L. 435, 438-39 (2004).

9. *Id.* at 438; *see also* *O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. Ct. 1211, 1217 (2006).

10. Jose Gabriel Da Costa, who is called Mestre Gabriel by UDV members, founded the church in Brazil in 1961. UDV-A Sagrada Uniao, [http://www.udv.org.br/english/area\\_amarela/index.html](http://www.udv.org.br/english/area_amarela/index.html) (last visited Nov. 21, 2006). UDV officially established a branch in the United States in 1993, which is headed by Jeffrey Bronfman, as representative mestre and president of UDV. *See O Centro*, 342 F.3d at 1172, 1174-75. The United States branch has roughly 130 members, and its headquarters are located in Santa Fe, New Mexico. *Id.* at 1174-75.

11. *See* MIRANDA & STEPHEN ALDHOUSE-GREEN, *THE QUEST FOR THE SHAMAN: SHAPE-SHIFTERS, SORCERERS AND SPIRIT-HEALERS OF ANCIENT EUROPE 19-21* (2005) (referring to Stone Age cave art).

12. *See* PIERS VITEBSKY, *SHAMANISM* 98-105 (Univ. of Okla. Press 2001) (1995).

13. *See id.* at 70-73; *see also* ALDHOUSE-GREEN, *supra* note 11, at 12.

14. ALDHOUSE-GREEN, *supra* note 11, at 12; *see also* *O Centro Espirita Beneficiente Uniao*

shamanistic based practices like UDV.<sup>15</sup> UDV's doctrine dictates that "members can perceive and understand God *only* by drinking hoasca."<sup>16</sup>

The importance of hoasca to UDV may be likened to the Native American Church's (NAC) reliance on peyote. Peyote, like hoasca, is cultivated primarily for its hallucinogenic properties and considered a vital religious sacrament, particularly by the NAC.<sup>17</sup> In fact, the NAC has also been referred to as "Peyotism" or the "Peyote religion."<sup>18</sup>

Though not considered a "popular" drug, peyote has been the focus of much adjudication and statutory law for decades, as courts and legislators have struggled to balance many competing interests.<sup>19</sup> The various cases can be contrasted, but the parties' interests are substantially similar. Religious members who desire to partake of sacramental entheogens claim an interest in religious freedom stemming from various authorities such as the First Amendment, Religious Freedom Restoration Act, and Equal Protection Clause.<sup>20</sup> The government, on the other hand, claims an interest in preventing the health and safety risks imposed by the "controlled substances" used by religious groups, as well as preventing diversion of such substances, especially for non-religious use.<sup>21</sup> Society's interests, as always, fall on both sides of the fulcrum.

## *B. Relevant Authorities*

### *1. The United Nations Convention on Psychotropic Substances<sup>22</sup> and the Controlled Substances Act<sup>23</sup>*

#### *The United Nations Convention on Psychotropic Substances (Convention)*

do Vegetal v. Ashcroft (*O Centro J*), 282 F. Supp. 2d 1236, 1238 (D.N.M. 2002).

15. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1174 (10th Cir. 2003).

16. *Id.* (emphasis added).

17. *See* *United States v. Boyll*, 774 F. Supp. 1333, 1335 (D.N.M. 1991) (quoting statements from Omer C. Stewart).

18. *See id.* (referring to the religion of the NAC as the "Peyote Religion"); *see also* *State v. Brashear*, 593 P.2d 63, 67-68 (N.M. Ct. App. 1979) (referring to the NAC religion as "peyotism").

19. *See, e.g.,* *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).

20. *Smith*, 494 U.S. at 876-77; *Peyote Way*, 922 F.2d at 1213-14, 1216, 1220.

21. *Smith*, 494 U.S. at 904-05.

22. *Convention on Psychotropic Substances*, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (United States entered into force on July 15, 1980) [hereinafter *Convention*].

23. 21 U.S.C. § 801 (2000).

is an international law representing a global stance on a variety of drugs.<sup>24</sup> The preamble clearly reveals the Convention's premise: it is "concerned with the health and welfare of mankind . . ." and the "public health and social problems resulting from the abuse of certain psychotropic substances."<sup>25</sup> The Convention characterizes specific substances through several schedules.<sup>26</sup> These schedules serve to categorize the drugs by their beneficial medicinal and scientific value, as well as their propensity for abuse.<sup>27</sup>

The Convention does not independently impose itself on the world, but rather requires ratification by signatory states.<sup>28</sup> The Controlled Substances Act<sup>29</sup> (CSA) represents the United States' signature to the Convention, and is essentially a domestic reflection of its international counterpart. Like the Convention, it is illegal under the CSA to "manufacture, distribute, or dispense, or possess . . ." a controlled substance.<sup>30</sup> Also, the CSA classifies controlled substances through schedules according to each drug's degree of potential abuse and accepted medicinal or scientific value.<sup>31</sup>

## 2. *The First Amendment*

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."<sup>32</sup> This provision comprises both the Establishment Clause and the Free Exercise Clause respectively. In *Abington School District v. Schempp*,<sup>33</sup> Justice Brennan explained that "the Establishment Clause [is] a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone."<sup>34</sup> Despite their ideal compatibility however, the two clauses are often in tension with one another because "any time the government acts to protect free exercise of religion, its primary purpose is to advance religion . . ." but on the other hand,

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24. Convention, *supra* note 22.

25. *Id.*

26. *Id.* art. 1(e).

27. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1175 (10th Cir. 2003).

28. Charest, *supra* note 8, at 444.

29. 21 U.S.C. § 801 (2000).

30. *Id.* § 841(a)(1).

31. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro I)*, 282 F. Supp. 2d 1236, 1248 (D.N.M. 2002).

32. U.S. CONST. amend. I.

33. 374 U.S. 203 (1963).

34. *Id.* at 256 (Brennan, J., concurring).

“any time the principle effect is to facilitate free exercise, the government is aiding religion.”<sup>35</sup>

It is likewise no surprise then, that the Supreme Court has found it especially difficult to find “a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”<sup>36</sup> This difficulty may be exacerbated by the fact that the Court has developed separate analysis for evaluating government action under the two clauses.

In 1963, the Court, in *Sherbert v. Verner*,<sup>37</sup> held that strict scrutiny was the appropriate standard for evaluating laws that burden the free exercise of religion.<sup>38</sup> In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court rejected the strict scrutiny standard for challenges to neutral laws of general applicability.<sup>39</sup> *Smith* held that the Free Exercise Clause of the First Amendment did not prohibit Oregon from applying its drug laws to ceremonial consumption of peyote, accordingly, the state could deny respondents’ unemployment compensation after their employer dismissed them for using the drug.<sup>40</sup>

The *Smith* Court recognized religion as encompassing two realms, beliefs and practices, noting that although laws “cannot interfere with mere religious belief and opinions, they may with practices.”<sup>41</sup> To hold otherwise, the Court found, would be to make “religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>42</sup>

### 3. Religious Freedom Restoration Act<sup>43</sup>

The *Smith* decision created a political and religious uproar. Opponents criticized the opinion for its misuse of precedent, and its lack of sensitivity toward minority religious groups, especially Native Americans.<sup>44</sup> Essentially, the *Smith* Court stated that those seeking religious exemptions from laws

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35. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1141 (2d ed. 2003).

36. *Waltz v. Tax Comm’n*, 397 U.S. 664, 668-69 (1970).

37. 374 U.S. 398 (1963).

38. *Id.* at 403.

39. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 885 n.3 (1990).

40. *Id.* at 890.

41. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

42. *Id.*

43. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

44. See generally Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991).

should use the democratic process for relief, instead of the courts.<sup>45</sup> Inevitably, Smith's opponents did exactly that. In 1993, Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA).<sup>46</sup> The RFRA states that its purpose is "to restore the compelling interest test as set forth in [*Sherbert*], and to guarantee its application in all cases where free exercise of religion is substantially burdened."<sup>47</sup>

Not surprisingly, various religious groups, including UDV, have invoked protection from the RFRA in order to maintain their religious practices.<sup>48</sup> Ultimately, the UDV cases were decided on the RFRA issue, and so likely will many similar cases in the future. However, this note will focus primarily on UDV's equal protection claim.

### III. The UDV Cases

#### A. District Court

At the district level, the court in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro I)*<sup>49</sup> granted UDV's request for a preliminary injunction, thus allowing the importation of hoasca.<sup>50</sup> The primary purpose of a preliminary injunction is to preserve the parties' status quo in order to maintain the last uncontested status between them until the court renders a judgment on the merits.<sup>51</sup> A court's broad discretion in granting preliminary injunctions is guided by four standards.<sup>52</sup> The party moving for preliminary injunction must show:

- (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.<sup>53</sup>

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45. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990).

46. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000).

47. *Id.* § 2000bb(b)(1).

48. *See, e.g., United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

49. 282 F. Supp. 2d 1236 (D.N.M. 2002).

50. *Id.* at 1270.

51. *Id.* at 1269.

52. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1177 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (2001)).

53. *Id.*

Additionally, if the preliminary injunction would alter the status quo relationship between the parties, the plaintiff has a heightened burden in showing that these four factors “weigh heavily and compellingly in [its] favor.”<sup>54</sup>

In the first district court case, UDV raised the following five issues in its motion for preliminary injunction: (1) that the federal government had infringed its rights under the Equal Protection Clause of the Fourteenth Amendment, made applicable to federal statutes by the Due Process Clause of the Fifth Amendment, by selectively enforcing the Controlled Substances Act (CSA) against them; (2) that the CSA’s treatment of dimethyltryptamine (DMT) as a controlled substance does not extend to include hoasca; (3) that by interpreting the CSA to prohibit their use of hoasca, the government violated their First Amendment rights under the Free Exercise Clause by restricting their religious practice; (4) that international law required the United States government to permit ceremonial use of hoasca; and (5) that the government did not meet the heavy burden imposed on it by the Religious Freedom Restoration Act (RFRA) to prove that the CSA’s restriction on their use of hoasca furthers a compelling governmental interest through the least restrictive means.<sup>55</sup>

The district court rejected the first four arguments, holding that (1) the government did not violate UDV’s rights under the equal protection clause, (2) the plain language of the CSA chosen by Congress clearly covered hoasca as a controlled substance, (3) the government did not infringe UDV’s rights under the First Amendment, and (4) the Convention did not override Congress’ clear application of the CSA to any use of hoasca in the United States.<sup>56</sup> The district court, however, found that the government did not meet the heightened burden imposed by the RFRA, requiring the government to show that the CSA’s restriction on UDV’s “religious practices regarding hoasca furthers a compelling governmental interest through the least restrictive means.”<sup>57</sup>

### *B. Appellate Court*

The Tenth Circuit Court of Appeals affirmed the district court’s decision for the same reasons.<sup>58</sup> Like the district court, the appellate court was not

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54. *Id.* (quoting SCFC ILC, Inc. v. Visa USA, Inc. 936 F.2d 1096, 1099 (10th Cir. 1991)).

55. *O Centro I*, 282 F. Supp. 2d. at 1239-40.

56. *Id.* at 1239.

57. *Id.*

58. *O Centro*, 342 F.3d at 1187.



persuaded by UDV's first four arguments, but found that the government did not meet its heightened burden under the RFRA.<sup>59</sup> The court gave more consideration in determining the parties' status quo — their last uncontested status before the controversy.<sup>60</sup> The significance of the status quo here, is that "[i]f a preliminary injunction alters the status quo, a plaintiff must 'show that on balance, the four [preliminary injunction] factors weigh heavily and compellingly in [its] favor.'"<sup>61</sup> In other words, if the status quo was the enforcement of the CSA against UDV, as the government asserts, then UDV would be seeking to alter the status quo, and thus would have a heightened burden to establish the four factors mentioned above. UDV, of course, claims that the status quo in this case should be viewed as their valid importation of hoasca before the government enforced the CSA against them.<sup>62</sup> According to the court, "[T]o say the enforcement of the CSA and the Convention against UDV is the status quo ignores the part played in this case by the RFRA."<sup>63</sup> The court found that the UDV had established a *prima facie* case under the RFRA, to which the government conceded, and that the government's "concession buttresses the conclusion that the status quo here is not the need to enforce the CSA but rather UDV's religious practice free from a governmentally imposed burden."<sup>64</sup>

### *C. Equal Protection: The Memorandum Opinion*

At both the district and appellate levels, UDV asserted an equal protection claim that was denied.<sup>65</sup> Specifically, UDV argued that the CSA is not neutral between religions because the law provides an exemption for the ceremonial use of peyote by the Native American Church (NAC).<sup>66</sup>

The court began its analysis by stating that the Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike."<sup>67</sup> The court noted UDV's argument "relies on a comparison between the government's treatment of

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59. *Id.*

60. *Id.* at 1177.

61. *Id.*

62. *Id.*

63. *Id.* at 1178.

64. *Id.* at 1179.

65. See *O Centro II*, 282 F. Supp. 2d 1271, 1284 (D.N.M. 2002); *O Centro*, 342 F.3d at 1186 n.4.

66. *O Centro II*, 282 F. Supp. 2d at 1275; *O Centro*, 342 F.3d at 1186 n.4.

67. *O Centro II*, 282 F. Supp. 2d at 1274.

UDV and its treatment of the [NAC].”<sup>68</sup> Because the NAC received a statutory exemption on peyote, a prohibited Schedule I substance, UDV asserted that it too should also receive an exemption.<sup>69</sup> This exemption is stated in 21 C.F.R. § 1307.31, which mandates that “[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.”<sup>70</sup> The New Mexico district court noted the government’s observation that in addition to the regulation, a federal statute also grants an exemption for the ceremonial use of peyote for Native Americans.<sup>71</sup> This federal statute is the American Indian Religious Freedom Act Amendments (AIRFAA), which provides that “[n]otwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful . . . .”<sup>72</sup>

The government argued that UDV and the NAC are not similarly situated under equal protection analysis.<sup>73</sup> According to the government, one “crucial difference between [UDV’s] situation and that of Native American peyote users lies in the unique relationship between the federal government and Indian tribes.”<sup>74</sup> In support of this proposition, the government relied on *Morton v. Mancari*.<sup>75</sup> In *Mancari*, a group of non-Indian employees of the Bureau of Indian Affairs (BIA) challenged the agency’s hiring preference for Indian employees.<sup>76</sup> The plaintiffs asserted that this hiring preference amounted to “invidious racial discrimination.”<sup>77</sup> The *Mancari* Court found that the BIA hiring preference “is not directed towards a ‘racial’ group consisting of ‘Indians,’” but rather “only to members of ‘federally recognized’ tribes.”<sup>78</sup> Thus, the Court characterized the preferences as political rather than racial in nature.<sup>79</sup> In denying the plaintiff’s claim, the

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68. *Id.* at 1275.

69. *Id.*

70. 21 C.F.R. § 1307.31 (1985).

71. *O Centro II*, 282 F. Supp. 2d at 1275.

72. 42 U.S.C. § 1996a(b)(1) (2000).

73. *O Centro II*, 282 F. Supp. 2d at 1275.

74. *Id.*

75. 417 U.S. 535 (1974).

76. *Id.* at 539.

77. *Id.* at 551.

78. *Id.* at 553.

79. *Id.* at 552-53.

*Mancari* Court noted “the unique legal status of Indian tribes under federal law” and of “the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.”<sup>80</sup> The district court noted that Congress drew on the trust responsibility described in *Mancari* when it created the AIRFAA.<sup>81</sup> In this statute, Congress found that “for many Indian people, the traditional use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures.”<sup>82</sup> Ultimately, the court agreed with the government, and concluded that “the UDV is not similarly situated to the NAC such that the federal courts must step in to declare that the government violates Equal Protection principles by allowing an exemption only for the use of Peyote in the NAC.”<sup>83</sup>

#### IV. Analysis

The UDV and NAC are similarly situated in society such that the government violates equal protection principles by failing to afford UDV similar rights as the NAC. In its memorandum opinion, the district court relied heavily on the fact that the federal government has a unique relationship with Native American tribes. Taken too far, however, this concept has resulted in an impermissible classification on the basis of religion. The court’s analysis, while not necessarily erroneous, is relatively short-sighted. UDV’s motion for preliminary injunction should have been granted as to its equal protection claim.

##### A. The NAC and UDV: Similarities Between Time and Religion

The memorandum opinion and other cases, finding that the NAC and other religious groups are not similarly situated in society, often accentuate the differences between the Peyote Religion of the NAC and other religions, while at the same time ignoring the similarities, which are admittedly not as apparent. The memorandum opinion, as well as the authorities relied upon, implies that the Peyote Religion has stood the test of time.<sup>84</sup> For example, the opening text of the AIRFAA states that “the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way

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80. *Id.* at 551.

81. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro II)*, 282 F. Supp. 2d 1271, 1276 (D.N.M. 2002).

82. 42 U.S.C. § 1996a(a)(1) (2000).

83. *O Centro II*, 282 F. Supp. 2d at 1284.

84. 42 U.S.C. § 1996a(a)(1).

of life.”<sup>85</sup> The court stated that “[p]eyote has a demonstrated track record of religious use in the United States, while hoasca does not.”<sup>86</sup> Similarly, in *Peyote Way Church of God v. Thornburgh*,<sup>87</sup> the Fifth Circuit noted that the federal NAC exemption allows Native Americans to “continue their centuries-old tradition of peyote use . . . .”<sup>88</sup>

It is on this point which most courts fail to sufficiently distinguish a church from a religion. While it is undoubtedly true that the use of peyote by Native American people has existed for centuries, the NAC is not yet 100 years old, as it was founded in Oklahoma in 1918.<sup>89</sup> The court does not mention this fact, and while it is not vital to the case, it may serve in narrowing one of the supposed differences between UDV and the NAC. UDV was founded in 1961, merely four decades after the NAC.<sup>90</sup> Furthermore, while various forms of the Peyote Religion, a foundation of the NAC, have existed for centuries, there is evidence that shamanistic practices, a foundation for UDV, have existed for thousands of years.<sup>91</sup>

Additionally, the district court downplayed the similarities between religious practice and origin between the NAC and UDV. Both UDV and the Peyote Religion have roots in shamanism.<sup>92</sup> As discussed above, shamanism generally represents a range of traditional beliefs and practices that involve the ability to cure and diagnose human illness, control the weather, and other phenomenal powers, often achieved through the use of entheogenic substances.<sup>93</sup> A shaman then, is referred to as one possessing these supernatural abilities.<sup>94</sup>

However, the etymology of the word “shaman” is not strictly defined. The word was derived from the language of the Evenk people of Siberia, and by the twentieth century, was applied in North America to a wide spectrum of medicine men.<sup>95</sup> While many people still use the term “medicine man” to refer to the one who was a spiritual healer in Native American tribes,

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85. *Id.*

86. *O Centro II*, 282 F. Supp. 2d. at 1284.

87. 922 F.2d 1210 (5th Cir. 1991).

88. *Id.* at 1216.

89. *United States v. Boyll*, 774 F. Supp. 1333, 1336 (D.N.M. 1991).

90. *O Centro I*, 282 F. Supp. 2d. at 1240.

91. See generally ALDHOUSE-GREEN, *supra* note 11.

92. VIRGIL J. VOGEL, *AMERICAN INDIAN MEDICINE* 22-24 (1970) (discussing the shaman as a central figure in Indian healing); see also Charest, *supra* note 8, at 438.

93. *Id.*

94. *Id.*

95. VITEBSKY, *supra* note 12, at 10.

ethnologists tend to use the word "shaman."<sup>96</sup> Some writers say that "shamans" were never associated with Native American religions.<sup>97</sup> Arguments of this type, however, seem to center more on the etymology of the term "shaman" rather than the concept. The primary point is that in many traditional Native American cultures, there was a spiritual leader who was credited with the power to communicate with spirits, heal the sick, and other powers similar to those traditionally associated with shamans, regardless of what scholars label them.<sup>98</sup> Like many traditional Native American tribes, UDV's religious practices are shamanistic in origin and character.<sup>99</sup> UDV, like the NAC, uses an entheogenic substance to occasion a religious experience, and believes the substance possesses healing powers.<sup>100</sup> Thus, many courts overlook the extent of religious similarities that exists between many sects of the NAC and UDV.

Although the Supreme Court did not specifically address UDV's equal protection claim, Chief Justice Roberts, in a unanimous opinion, indicated the lack of substantial, legal distinction between Indian tribes and UDV.<sup>101</sup> According to the Court:

Everything the Government says about the DMT in *hoasca* -- that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision," — *applies in equal measure* to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.<sup>102</sup>

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96. VOGEL, *supra* note 92, at 22.

97. Tori McElroy, Shamanism, <http://www.angelfire.com/journal/cathbodua/Shamanism.html> (last visited Nov. 21, 2006).

98. See VITEBSKY, *supra* note 12, at 93; see also ALDHOUSE-GREEN, *supra* note 11, at 164.

99. See discussion *supra* Part II.

100. See discussion *supra* Part II.

101. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1222 (2006).

102. *Id.* (emphasis added) (citations omitted).

Additionally, the Court responded in a like manner to the government's assertion that its "unique relationship" with the tribes justifies its refusal to extend the exemption over a Schedule I substance to UDV.

The Government responds that there is a "unique relationship" between the United States and the Tribes, but never explains what about that "unique" relationship justifies overriding the same congressional findings on which the Government relies in resisting any exception for the UDV's religious use of *hoasca*. In other words, if any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.<sup>103</sup>

### *B. NAC Membership: The Crux of the Issue*

As mentioned previously, the government cited *Morton v. Mancari* in the memorandum to show that Congress relied on the Court's description of a "guardian-ward" status and the "unique obligation" between the United States government and Indian tribes in passing the AIRFAA.<sup>104</sup> The Court agreed with the government that "[t]he legislative background of AIRFAA thus reflects that in enacting the statute, Congress relied on the principles outlined in *Mancari*."<sup>105</sup> The court noted that even UDV does not dispute this.<sup>106</sup> Instead, UDV focused its argument on the federal regulation,<sup>107</sup> rather than the AIRFAA.<sup>108</sup> However, the court's discussion of AIRFAA and *Mancari* merits further analysis.

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) challenged the employment preference for qualified Indians.<sup>109</sup> Concerning

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103. *Id.* (citations omitted).

104. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro II)*, 282 F. Supp. 2d 1271, 1276 (D.N.M. 2002).

105. *Id.* at 1277.

106. *Id.*

107. 21 C.F.R. § 1307.31.

108. *O Centro*, 282 F. Supp. 2d at 1277.

109. *Morton v. Mancari*, 417 U.S. 535, 537 (1974).

the special treatment of Indians relative to other groups, *Mancari* held that “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward Indians, such legislative judgments will not be disturbed.”<sup>110</sup> The *Mancari* Court found that the BIA’s hiring preference “is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes.”<sup>111</sup> According to BIA policy, in order for an individual to be eligible for preferential treatment, he or she must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe.<sup>112</sup> Thus, *Mancari*’s political classification is seemingly applicable only to Indians with at least twenty-five percent Indian blood who are also members of federally recognized tribes.<sup>113</sup> In other words, it is apparent that Congress would *not* have a unique obligation to an “Indian” who could only show that she possessed fifteen percent “Indian blood.”

The term “Indian blood” seems to refer to a racial rather than political classification. The *Mancari* Court however, noted that “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . .”<sup>114</sup> Nonetheless, in order for *Mancari* to apply, the individuals in question would apparently need to contain at least twenty-five percent Indian blood.

Although, in support of its argument, the government cited *Mancari* primarily to show that Congress relied on the Court’s decision in passing the AIRFAA, rather than for the racial/political analysis, it is nonetheless worth discussing for the purpose of establishing a very important point: Not all members of the NAC have at least twenty-five percent Indian blood.<sup>115</sup> The court does not avoid confronting the discussion of this pivotal issue.<sup>116</sup> If indeed some NAC members are not legally “Indian,” then § 1307.31 seems unconstitutional. In other words, if all members of the NAC qualified as “Indians,” an undoubtedly protected political class toward whom the United

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110. *Id.* at 555.

111. *Id.* at 554 n.24.

112. *Id.*

113. See *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991).

114. *Mancari*, 417 U.S. at 554.

115. See Brief for Respondents at 22 n.10, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (No. 04-1084), 2005 WL 2228369 (“But the NAC has always had non-Indian members . . . .”); *United States v. Boyll*, 774 F. Supp. 1333, 1337 n.3 (D.N.M. 1991).

116. See *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro II)*, 282 F. Supp. 2d 1271, 1276-82 (D.N.M. 2002).

States government has a unique obligation, then giving the NAC an exemption from Schedule I substances appears constitutionally valid. However, if not all NAC members are legally “Indian,” then the government, through § 1307.31, appears to be violating the Establishment Clause by promoting one religion over all others. In other words, the “unique obligation” justification stated in *Mancari* would be severely weakened when applied to the NAC, and would justify the exemption of a very similar substance in hoasca to a similarly situated religious group, UDV. Of course, if the NAC is comprised of only Native Americans, then one could scarcely argue that a small group of non-Indians from New Mexico is similarly situated to a people possessing such a unique history as Native Americans.

Furthermore, the government does not have a “unique relationship” with a politically or racially mixed church, even if that church possesses the title of “NAC.” Article I of the Constitution grants Congress the power to regulate commerce with the Indian tribes, but would not condone such power of regulation over a church, whose congregation is decided not on political classifications, but rather on theological devotion, and other conventional standards. In essence, if the NAC has at least a noticeable number of non-Indian members, it might as well be just another church — theology aside.

Therefore, the ultimate question is whether non-Indian members, or people with less than twenty-five percent Indian blood, are allowed to join the NAC. The answer must be yes. In *United States v. Boyll*, the court found that “the vast majority of Native American Church congregations, like most conventional congregations, maintains an ‘open door’ policy and does not exclude persons on the basis of their race.”<sup>117</sup> “As a result, non-Indian members are accepted within the [NAC].”<sup>118</sup> In *Boyll*, a long-time, non-Indian member of the NAC was indicted for importing peyote.<sup>119</sup> The court held that Mr. Boyll was indeed a member of the NAC under their common “open door” policy.<sup>120</sup>

The court did not ignore this strong evidence, which is bolstered by affidavits of several NAC members.<sup>121</sup> The court relied on *Peyote Way Church of God v. Thornburgh*.<sup>122</sup> In *Peyote Way*, a non-Native American church, brought an equal protection claim similar to UDV’s, challenging the

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117. *Boyll*, 774 F. Supp. at 1336.

118. *Id.* at 1337 n.3.

119. *Id.* at 1335.

120. *Id.* at 1337.

121. *Id.*

122. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).



exclusiveness of the NAC exemption.<sup>123</sup> Like the UDV case, *Peyote Way* turned on whether non-Indians were valid members in the NAC. Indeed, if non-Indians were allowed to use peyote in the NAC, the *Peyote Way* court would be strained to concoct a constitutional justification for denying those same people (non-Indians) the same right merely because they joined a different religious organization. In fact, the founder of *Peyote Way*, Immanuel Trujilio, was a former NAC member.<sup>124</sup> Unlike *Boyll* however, the *Peyote Way* court found that “all NAC members are of [twenty-five percent] ancestry,” and thus, all members would fall under the political classification of *Mancari*.<sup>125</sup> Thus, *Boyll* and *Peyote Way* are in complete disagreement as to whether all NAC members have at least twenty-five percent Native American ancestry.

There are reasons for this discrepancy. Essentially, the *Peyote Way* court relied on the testimony of NAC National Chairman, Emerson Jackson, and chose to adopt the technical or official interpretation of NAC “membership,” as it is recorded in the NAC articles of incorporation.<sup>126</sup> *Peyote Way* corroborates Jackson’s statements by merely citing that the “record contains articles of incorporation filed by the [NAC] of Navajoland, Inc., and a ‘Certificate of Authorization’ to transport peyote that requires a tribal enrollment number . . . .”<sup>127</sup> The court also noted Jackson’s testimony that “[i]n our bylaws, we stipulate that [members] be [twenty-five percent] Indian.”<sup>128</sup> Jackson, as a top political figure of the NAC, is merely citing the rule.<sup>129</sup> The court and Jackson both adopted an overly narrow, albeit official, interpretation of the word “member,” and essentially asserted that “the rule says, therefore it is.” However, the court’s mere reciting of a rule does not necessarily lead to the conclusion that *all* NAC members are of twenty-five percent Indian blood.

This type of scenario may be recreated hypothetically. Suppose that boys are not allowed on the girls’ high school basketball team. Under allegations that some of the team’s members are actually boys in disguise, the coach confidently cites the student handbook, which clearly and unsurprisingly states: “only girls are members of the girls’ basketball team.” This means that

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123. *Id.* at 1212.

124. *Id.*

125. *Id.* at 1215.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

a boy cannot officially be a *member* of the girls' team. Thus, he will not receive class credit, get his name mentioned under the team photo in the yearbook, or get his own locker in the girls' locker room. But is it possible that he could nonetheless play basketball on the girls' team? Absolutely.

Admittedly, this hypothetical scenario is not perfectly representative of the case at hand; however, there are likely thousands of non-Indian people who would call themselves "members" of the NAC. Likewise, according to the "open door" policy described in *Boyll*, these same people would likely be referred to as "members" by the Native American members in their congregation.<sup>130</sup> The non-Indians would probably not attend their respective churches if they had not in the first place been welcomed by Native American members. Likewise, Indian members would not invite non-Indians to their place of worship, share their sacred peyote with them, fellowship with them, and engage in an intimate spiritual experience through sacred rituals with them, and then afterwards not even refer to them as mere members. The Peyote Religion considers it sacrilegious to use peyote for nonreligious purposes, and thus Indian members would not likely share it with those who they considered as non-members.<sup>131</sup>

However, the court, adopting Mr. Jackson's stance in *Peyote Way*, ultimately decides that the DEA's interpretation of § 1307.31 distinguishes and excludes the wannabe, non-card carrying criminals by the difference in their "blood" or "political classification," both of which are secret code words for "race." Article I of the Constitution grants Congress the power to "regulate Commerce . . . with the Indian Tribes,"<sup>132</sup> not to regulate racially restrictive requirements for NAC membership. It is not Congress, but rather members of the church congregation who should decide with whom they wish to have fellowship and share their sacred substance.

*Peyote Way* is wrong, and thus so is the court's memorandum. Not all members of the NAC possess at least twenty-five percent Indian blood. It is absurd and short-sighted for the government to assert that a genuinely devoted practitioner of the Peyote Religion is denied membership to a church of her faith because she has twenty-four percent Indian blood, or even no Indian blood, especially if she is welcomed by the Native American members of a particular NAC congregation. The court even concedes the fact that

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130. See *United States v. Boyll*, 774 F. Supp. 1333, 1336-37 (D.N.M. 1991).

131. See Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 380 (1993).

132. U.S. CONST. art. I, § 8, cl. 3.

"some local peyotist congregations may welcome non-Indian members," yet concluded that the term "Native American Church" is broad and unambiguous, meaning that § 1307.31 is ambiguous.<sup>133</sup> The court then consulted extrinsic material to decide that the DEA, in promulgating § 1307.31, meant to exclude all but Indian members of the NAC to receive the benefits of the peyote exemption.<sup>134</sup> The court further relied Congress' legislative history of the AIRFAA to bolster the DEA's supposed interpretation -- that the term "Native American Church" applies to Indian members only.<sup>135</sup>

Of course, the courts and Congress should not construe the definition of "Native American Church" to breach reasonable boundaries, and thus allow anyone to use a Schedule I substance. Nonetheless, it is fair to say that not all members of the NAC possess at least twenty-five percent Indian blood. This fact makes the NAC much more similarly situated to UDV. Furthermore, the DEA's granting of an exclusive exemption to the NAC, especially when NAC membership is not, in practice, predicated upon legal Indian heritage, results in an impermissible legislative classification of the basis of religion in violation of the Equal Protection Clause, irrespective of First Amendment issues. The Supreme Court has stated that when such a classification exists, "equal protection analysis requires strict scrutiny . . ."<sup>136</sup> As of now, the two religious organizations are disparately situated despite similarities in religious practice. Both shaman-based religions regard as vital to their religion, the consumption of similar Schedule I substances producing similar hallucinogenic effects.<sup>137</sup> Additionally, both religions consider the consumption of their respective entheogens outside of ceremonial religious contexts to be sacrilegious.<sup>138</sup>

Unfortunately for UDV, many insincere religious groups comprised of mere addicts and dealers have made it difficult for sincere religious movements like UDV to obtain equal protection rights. For example, in

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133. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro II)*, 282 F. Supp. 2d 1271, 1278 (D.N.M. 2002).

134. *Id.* at 1278.

135. *Id.*

136. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam).

137. See *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F. 3d 1170, 1174 (10th Cir. 2003) (discussing the importance of hoasca to UDV); see also *O Centro II*, 282 F. Supp. 2d at 1281 (discussing the importance of Peyote to Native Americans).

138. *O Centro*, 342 F.3d at 1185 ("[U]sing [hoasca] outside the religious contest is a sacrilege."); *United States v. Boyll*, 774 F. Supp. 1333, 1335 (D.N.M. 1991) ("It is considered sacrilegious to use peyote for nonreligious purposes.").

*United States v. Meyers*,<sup>139</sup> a criminal defendant moved, under RFRA, to dismiss marijuana charges against him and “testified that he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth.”<sup>140</sup> Other, perhaps more sincere religious groups have inadvertently left behind jurisprudential obstacles for UDV. In *McBride v. Shawnee County*,<sup>141</sup> members of the Rastafarian religion who were convicted on marijuana charges asserted that it was unconstitutional for the state of Kansas to permit the religious use of peyote in the NAC, but not the Rastafarian church.<sup>142</sup> In denying their assertion, the court correctly concluded that “[t]he two religions are not similarly situated because the circumstances surrounding their drug use is drastically different.”<sup>143</sup> NAC members generally ingest peyote at carefully-planned road meetings, while the use of marijuana in the Rastafarian church is uncontrolled.<sup>144</sup> Likewise, unlike Rastafarians with marijuana, UDV members carefully control their hoasca consumption.<sup>145</sup> “Hoasca is ingested at least twice monthly at guided ceremonies lasting about four hours.”<sup>146</sup> Like *Meyers* and *McBride*, other cases involving marijuana, unsurprisingly, have had little success.<sup>147</sup> However, hoasca is distinguishable in that it has a much lower chance for distribution outside the controlled religious realm of UDV.<sup>148</sup> Likewise, hoasca and marijuana differ in that “[m]arijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses.”<sup>149</sup> Thus, arguments attempting to compare the failure of religious equal protection claims involving marijuana to UDV’s situation are not at all persuasive. Marijuana and hoasca are clearly different drugs not only concerning their propensity for abuse, but also in their availability. One drug

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139. 95 F.3d 1475 (10th Cir. 1996).

140. *Id.* at 1479.

141. 71 F. Supp. 2d 1098 (D. Kan. 1999).

142. *Id.* at 1100.

143. *Id.* at 1101.

144. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft (O Centro II)*, 282 F. Supp. 2d 1271, 1283 (D.N.M. 2002).

145. *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170, 1174 (10th Cir. 2003).

146. *Id.*

147. *See, e.g., State v. Balzer*, 954 P.2d 931 (Wash. Ct. App. 1998).

148. *See O Centro I*, 282 F. Supp. 2d. at 1265-66.

149. *O Centro*, 342 F.3d at 1185.

is widely available and used throughout the country, while the other is consumed by roughly 130 people in the State of New Mexico.<sup>150</sup>

### *V. Conclusion*

The *UDV* court arrived at the correct result under the RFRA, but should have also upheld UDV's valid equal protection claim. The equal protection issue is especially important because it presents another valid medium for sincere religious organizations who rely on prohibited entheogens to achieve their own religious experience. Courts have cited the unique relationship that the government has with the Indian tribes as a legitimate reason for denying other religious individuals and groups similar religious rights.<sup>151</sup> Not only is this reasoning short-sighted, but such a standard effectively prohibits any other group, from now until eternity, from achieving the type of religious equal protection asserted by UDV. In other words, it is essentially impossible for any other socio-ethnic group to establish the type of special, historical relationship that exists between the United States government and the tribes. Thus, if all sincere religious practices involving controlled substances are swiftly prohibited, no group will ever have the time to establish their own religious entheogen in the same way that the Native Americans have established peyote, unless the government actually gives them a chance to show that they are not abusing the drug, either through consumption or distribution, but rather are relying on it for sincere religious reasons. Equal protection demands a more achievable standard, especially where religious neutrality is at stake.

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150. See *O Centro I*, 282 F. Supp. 2d. at 1240.

151. See generally, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974).